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IN THE

Supreme Court of the United States

October Term, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK AND JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York,

Petitioners,

against

MILHELM ATTEA & BROS. INC. a/k/a MILHELM ATTEA & BROTHERS, INC., a/k/a MILHELM ATTEA & BROTHERS, INC., 1509 Clinton Street, Buffalo, New York 14206,

Respondent.

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

Petitioners,

against

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF THE EMPIRE STATE PETROLEUM ASSOCIATION, INC. AND THE PETROLEUM MARKETERS ASSOCIATION OF AMERICA, INC., AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

ROLAND, FOGEL, KOBLENZ & CARR
Attorneys for The Empire State Petroleum Association, Inc. and The Petroleum Marketers Association of America, Inc.
One Columbia Place
Albany, NY 12207
(518) 434-8112

EMILIO A. F. PETROCCIONE
Counsel of Record

USHER FOGEL
Of Counsel

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THE REPORTER COMPANY, INC.—Walton, NY 13856—800-252-7181
Syracuse Office, University Building, Syracuse, NY 13202—315-426-1235
NYC Office—30 Vesey St., New York, NY 10007—212-732-6978—800-800-4264

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Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Brief of the Empire State Petroleum Association, Inc. and the Petroleum Marketers Association of America, Inc. as *amici curiae* in support of the Petitioners

Preliminary Statement

This brief is filed on behalf of the Empire State Petroleum Association, Inc. (ESPA) and the Petroleum Marketers Association of America, Inc. (PMAA) as *amici curiae* in support of Petitioners on the review of this matter following this Court's granting of a Writ of Certiorari to the Court of Appeals of the State of New York by Order dated November 1, 1993. The consents of all parties to the filing of this brief were obtained and have been filed with the Clerk of the Court.

Interest of the *Amici Curiae*

The Empire State Petroleum Association, Inc. is a New York not-for-profit trade association representing approximately 450 individual-member companies engaged in supplying and marketing refined petroleum products and related services to consumers throughout the State of New York.[1] ESPA's membership is predominantly comprised of independent wholesale and retail distributors of gasoline, diesel fuel, heating oil, and other petroleum based products. ESPA members who are engaged in motor fuel distribution or who own or operate retail service stations, particularly in the Central and Western regions of New York State, compete with Indian retailers for the sale of motor fuels to non-Indians. ESPA dealers and service station operators collect and remit to the State Department of Taxation and Finance

[1]Neither ESPA nor PMAA has any parent or subsidiaries to list pursuant to Rule 29.1.

motor fuel taxes on the sale of products to consumers. In contrast, Indian retailers refuse to pay these taxes on sales of motor fuel products to non-Indians although such taxes are lawful and are required to be collected. Consequently, Indian retailers enjoy a tremendous price advantage on the sale of their products, a price advantage with which petroleum marketers cannot compete.

PMAA is a not-for-profit federation of forty-four state and regional trade organizations (including ESPA) representing more than ten thousand independent petroleum marketers throughout the United States. Collectively, these marketers distribute approximately half of the gasoline and sixty percent of the diesel fuel consumed annually in the United States.

PMAA notes that the unfortunate tax avoidance trend which has sharply impacted petroleum marketers in New York, is starting to spread to other parts of the country. Marketers in many parts of the country have complained of having to compete with tax free sales of motor fuel to non-Indians on Indian reservations. Consequently, this Court's decision on the effort by the State of New York to ensure equitable collection of state taxes, will certainly have relevance well beyond the boundaries of New York State, thereby affecting PMAA's members.

ESPA's and PMAA's purpose in filing this brief is to bring to the Court's attention matters of significant public importance which will not be presented by the parties. Specifically, the outcome of this case will not only determine the validity of the state's cigarette tax regulations, but

will also impact upon similar motor fuel tax regulations, and ultimately the competitive viability of the associations' members. In addition, the *amici* believe that the case has widespread implications concerning the state's ability to balance delicately the sovereign rights of an Indian nation with its own lawful right to collect taxes on sales to non-Indians, and the effect of such efforts by the state upon competing businesses, the public and the local economies.

The cigarette tax scheme under scrutiny in this case (20 NYCRR Parts 335.6 and 335.7)[2] was designed to alleviate tax evasion which occurs on the sale of cigarettes on Indian reservations to non-Indians. The regulations are nearly identical to motor fuel tax regulations of the Department (20 NYCRR Parts 414.6 and 414.7) which were likewise created to prevent the tax-free sales of motor fuel. The tax schemes were simultaneously prepared, published for public comment and promulgated. Both sets of regulations became effective in November of 1988.

The similarity between the two schemes has been recognized by the New York courts. In *Matter of New York State Department of Taxation and Finance v. MacLeod*, 168 A.D.2d 802 (3d Dept. 1990) the Appellate Division held that New York's motor fuel tax scheme was invalid based upon its own previously issued opinion in this case involving the very cigarette tax regulations at issue here. See, *Milhelm Attea and Brothers v. Taxation and Finance*, 164 A.D.2d 300 (3d Dept. 1990). Consequently, this Court's decision on the validity of the cigarette tax scheme will

[2]In December of 1990, these regulations were renumbered without any substantive change. Former numbering is used here to avoid confusion in reviewing the state court opinions.

directly affect the related motor fuel regulations and ultimately the economic viability of motor fuel marketers.

The failure of Indian retailers to collect state taxes on sales to non-Indians not only deprives New York of tax revenue to which it is lawfully entitled, but oppresses competition and harms legitimate operators who collect state and local taxes on motor fuels and cigarettes. A gallon of gasoline costing $1.25 can be sold without state taxes for 32 cents less. A carton of cigarettes without state taxes is over five dollars cheaper. With these illegal price "discounts", competing businesses continue to lose non-Indian patronage to Indian retailers who openly market the sale of their tax-free products. The loss in motor fuel tax revenue has been estimated by the State to be $35 million annually (see, Petition for Writ of Certiorari dated August 31, 1993, p. 12, footnote 5). This is only a fraction of the loss in motor fuel sales that would otherwise be made by non-Indian businesses who collect taxes.

The motor fuel and cigarette tax schemes were crafted by the department to provide for the fair and equitable application and collection of state taxes on sales to non-Indians. In doing so, the regulations do not curtail the sale of tax-free products to Indians on reservations and only place minimal recordkeeping requirements upon Indian traders. If upheld, the state can prevent pervasive tax evasion while simultaneously restoring a fair, open and competitive environment to the retail motor fuel market.

The parties to this matter are properly concerned with establishing their legal points as to the validity of the Court of Appeals' June 10, 1993 Opinion. ESPA and PMAA, however, respectfully request that the Court also give con-

sideration to the broader public policy aspects of this case. This brief is submitted with the intention that it will assist the Court by bringing these matters to its attention.

Statement of the Case

ESPA and PMAA respectfully incorporate by reference the Statement of the Case as set forth in the Petitioners' brief.

Summary of Argument

The New York Court of Appeals Order should be reversed for two reasons. First, the Court of Appeals' June 10, 1993 opinion conflicts with this Court's prior opinions in *Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463 (1976), *Washington v. Confederated Tribes of Colville Reservation,* 447 U.S. 134 (1980), and most recently, *Oklahoma Tax Commission v. Citizen Band Potowatomi Indian Tribe of Oklahoma,* 498 U.S. 505 (1991). These decisions recognized the right of states to impose minimal burdens on Indian traders to prevent tax avoidance by non-Indian purchasers of products from Indian retailers. It was the *Potowatomi* case which this Court ordered the Appellate Division to consider on remand of this matter (A17-A18). In addition, ESPA and PMAA believe that matters of significant public importance, which go beyond the state's lawful right to collect taxes on sales of products to non-Indians, warrant a reversal of the Court of Appeals' order (A1-A2). Specifically, whether and by what method the state can lawfully prevent tax avoidance by non-Indians will significantly impact the economic viability of competing businesses, and possibly that of surrounding communities as well.

ARGUMENT

I.

Significant Public Policy Implications Warrant a Reversal of the Order of the Court of Appeals

As noted above, ESPA and PMAA are concerned with the validity of motor fuel tax regulations (20 NYCRR 414.6 and 414.7) which are similar to the contested cigarette tax regulations under review here. This Court's decision will naturally determine the legal status of the motor fuel regulations promulgated by the state to prevent motor fuel tax evasion by non-Indians.

Without question, the state is entitled to payment of taxes on sales of taxable products sold by Indians to non-Indians and may even regulate Indian retailers on reservations to collect such taxes. *Potowatomi,* 498 U.S. 505, 512. It is the method of securing the collection and payment of those taxes that has proven difficult.

Attempts to enlist the aid of Indian retailers or Indian nations have not been successful, and prior regulations have been struck down by the New York Court of Appeals (*Herzog Brothers Trucking, Inc. v. State Tax Commission,* 69 N.Y.2d 536 [1987] and 72 N.Y.2d 720 [1988]). In response, the state carefully designed cigarette and motor fuel tax regulations that provide for the fair application and collection of state taxes solely on sales to non-Indians while only minimally burdening Indian traders. (20 NYCRR 414.6 and 414.7—motor fuel; 20 NYCRR 335.6 and 335.7—cigarettes). In New York, ESPA has long supported the develop-

ment and implementation of an equitable motor fuel tax scheme which ensures that members of industry and consumers pay their proportionate share of taxes and that no one is permitted to avoid taxes illegally. Nonetheless, without these regulations, the avoidance of tax will continue unabated to the detriment of the state, its businesses, and its citizens.

The avoidance of tax on the sales of cigarettes and motor fuels is a serious problem. The state reports annual tax revenue losses of approximately $65 million in cigarette taxes and approximately $35 million in motor fuel taxes because of reservation sales to non-Indians.[3]

The temptation for non-Indians to purchase motor fuel products from a reservation is considerable given the price discrepancy when taxes are not charged on the sale. A gallon of gasoline which costs a $1.25 includes approximately 50 cents in taxes, of which 32 cents are attributable to state taxes. A gallon of diesel which costs $1.35 includes approximately 60 cents in taxes, of which 35 cents are attributable to state taxes. A 32 or 35 cents-per-gallon price advantage is a margin against which petroleum marketers cannot compete.[4]

Since many state highways and roads traverse reservations, there are numerous easily accessible motor fuel distri-

[3]Even these figures may be underestimated. As the petition for Writ of Certiorari noted, the estimate is based only on those suppliers who responded with data. (See Petition, p. 12, fn. 5.)

[4]Petroleum marketers further suffer in damage to their reputation. Despite widespread publicity, ESPA reports that many consumers erroneously believe that the honest marketer is overcharging the customer in the sale of motor fuel products.

bution sites offering tax-free sales of cigarettes and motor fuels. Those members of ESPA who operate retail gasoline service stations within reasonable proximity of Indian reservations, and those members who distribute and supply motor fuel and other products to those service stations, are suffering economic losses from the tax-free sales made on motor fuel products sold on Indian reservations to non-Indians. According to ESPA, some of its members have been forced out of business, while others are in jeopardy of following the same course. Some have downsized due to considerable loss of business. Distributors and service station operators cannot compete with Indian retailers who do not collect and pay state taxes and who aggressively and openly market this fact to customers.

The harmful economic impact attendant to this tax avoidance problem is not limited to service station dealers. The loss or downsizing of retail service station dealers engenders further wide ranging detrimental economic impacts. The closing or downsizing of retail stations engenders the loss of a needed public service, decreases competition among service station operators and limits the choice of products, services, and retail establishments available to the consumer. The closing of service stations also results in significant revenue losses to the surrounding region, and an increase in unemployment of workers. Thus, the avoidance of tax has a direct and immediate adverse impact upon the surrounding counties, towns, villages and other political subdivisions of the state.

The adverse effects of these tax-free sales also impact businesses and communities throughout the state, not merely the areas near the reservations. Since tractor trailers typically can carry over 200 gallons of fuel, they can, for

example, fill up with tax-free motor fuel on a reservation in Western New York and have sufficient fuel to travel to Boston and return without refueling, bypassing all the stations and truck stops along the way. Understandably, those operators and adjacent communities would suffer economic losses.

ESPA and PMAA respectfully submit that this Court's decision will not only impact upon sales of motor fuels and cigarettes, but ultimately any other product which is or could be sold on reservations to non-Indians. Without doubt, other Indian nations and entrepreneurs in New York State[5] and throughout the nation, will monitor this Court's decision. An affirmance of the Court of Appeals' order nullifying the state tax regulations will essentially permit tax evasion to take place throughout the State of New York and encourage additional tax evasion nationwide with respect to many products and services, besides cigarettes and motor fuel, which are taxed by each state.

[5]Indian reservations are located throughout the state, including Northern New York and Long Island, as well as Central and Western New York.

II.

The Court of Appeals' Decision is in Conflict with the Decisions of This Court Permitting States to Impose Minimal Burdens on Indian Traders to Prevent the Avoidance of Taxes by Non-Indian Purchasers of Products From Indian Retailers

Relying mostly on its previous opinions in *Herzog Brothers Trucking, Inc. v. State Tax Commission*, 69 N.Y.2d 536 (1987) and 72 N.Y.2d 720 (1988) and broad language from this Court's opinion in *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965), the New York Court of Appeals found New York's cigarette tax regulations invalid under a rigidly applied preemption test because the Respondents are Indian traders (A7). In essence, the Court of Appeals' decision holds that Indian traders are endowed with automatic and absolute immunity from even the most minimal burdens created by state tax regulations designed to collect taxes from non-Indian purchasers. However, as this Court noted in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989):

> "Questions of pre-emption in the [area of Indian affairs] are not resolved by reference to standards of preemption that have developed in other areas of the law, and are not controlled by 'mechanical absolute conceptions of state or tribal sovereignty.' [Citation omitted.] Instead, we have applied a flexible pre-emption analysis sensitive to the particular facts and legislation involved. *Each case 'requires a particularized examination of the relevant state, federal and tribal interests'* " [Citation omitted] (Emphasis supplied).

It is respectfully submitted that in reviewing the challenged regulations, the Court of Appeals did not perform such an

examination balancing state, federal and tribal interests, but rather adhered to its prior *Herzog* determinations which are in direct conflict with this Court's decisions in *Moe*, *Colville* and *Potowatomi*.

Moreover, the Court of Appeals placed undue emphasis upon the language of *Warren Trading Post* which stated that Congress has preempted the field of Indian trading on reservations. In doing so, it failed to apply this Court's subsequent opinions in *Moe*, *Colville*, and *Potowatomi*, and instead, continued to invoke its rigid and erroneous view of the applicable legal standard.

In *Moe*, this Court validated a State of Montana tax scheme which required Indian tribal retailers to collect a state sales tax imposed upon non-Indian purchasers of cigarettes. Balancing the competing sovereign interests, this Court found:

> "The State's requirement that the Indian tribal seller collect a tax validly imposed on non-Indians is a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax . . . this burden is not, strictly speaking, a tax at all . . . [w]e see nothing in this burden which frustrates tribal self-government, [citations omitted] or runs afoul of any congressional enactment dealing with affairs of reservation Indians . . ."

Moe, 425 U.S. at 483.

Significantly, in *Moe*, this Court distinguished *Warren Trading Post* primarily on the ground that the Arizona tax was a gross income tax imposed upon the on-reservation sales by the Indian trader to the reservation Indians. This Court recog-

nized that the legal impact of the Arizona tax fell upon the Indian trader with the economic burden of such tax affecting both the Indian trader and the Indian tribe while in *Moe*, the economic impact of the Montana tax rested on the non-Indian. 425 U.S. at 482.

This Court confirmed the Montana tax scheme requiring pre-collection by both Indian traders and reservation Indian retailers of the cigarette tax imposed upon non-Indian purchasers. As the *Moe* opinion noted, "[w]ithout the simple expedient of having the retailer collect the sales tax from non-Indian purchasers, it is clear that wholesale violations of the law by the latter class will go virtually unchecked." 425 U.S. at 482. Thus, after weighing state, federal and tribal interests, the Court permitted the state to require the Indian proprietor to add state tax to sales made to non-Indians.

This balancing approach was subsequently applied in *Colville* where this Court approved the State of Washington's cigarette tax laws which imposed obligations upon the operators of tribal smokeshops to assist in the collection of tax on non-Indian purchases and prevent the avoidance of tax by non-Indians on such purchases. The Indian retailers, who were also licensed Indian traders, were required to purchase and affix tax stamps to cigarette packages intended for sale to non-Indians and to meet regulatory record-keeping requirements pertaining to such sales.[6]

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[6]The *Colville* opinion also confirmed this Court's prior decision in *Moe* stating that state excise and sales taxes on cigarettes could be collected on non-Indian purchases made on Indian reservations. 447 U.S. at 151. Indian retailers, therefore, could be required to collect such taxes on their sales to non-Indians.

Perhaps most significant was that in *Colville* this Court recognized and validated a state's power to seize shipments of unstamped cigarettes traveling to the reservation from out-of-state suppliers even though the tribal businesses were "concededly exempt from state taxation, [and] no state tax is due when the cigarettes are in transit." 447 U.S. at 161. This Court continued:

> "We find that Washington's interest in enforcing its valid taxes is sufficient to justify these seizures. Although the cigarettes in transit are as yet exempt from state taxation, they are not immune from seizure when the Tribes, as here, have refused to fulfill collection and remittance obligations which the State has validly imposed. It is significant that these seizures take place outside the reservation, in locations where state power over Indian affairs is considerably more expansive than it is within reservation boundaries. [Citation omitted] By seizing cigarettes en route to the reservation, the State polices against wholesale evasion of its own valid taxes without unnecessarily intruding on core tribal interests."

Colville, 447 U.S. at 161-162.

In *Colville*, this Court foresaw with prescient clarity the very problems now faced by non-Indian retailers in New York:

> "It is painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservation by activities in which the Tribes have a significant interest. [citations omitted] What the smokeshops offer these customers, and what is not available elsewhere, is solely an exemption from state taxation. The Tribes assert the power to create such exemptions . . . If this assertion were accepted, the Tribes could . . . open chains of discount stores at reservation borders, selling goods of all descriptions at deep discounts and drawing custom from surrounding areas."

Colville, 447 U.S. at 155.

This Court also reviewed the issue of federal preemption in a broader context and examined all the pertinent federal Indian statutes, including the Indian Trader Law (25 U.S.C. §261 *et seq.*). Based upon its review, this Court concluded:

> "The Indian Trader statutes, 25 U.S.C. §261 *et seq.*, incorporate a congressional desire comprehensively to regulate businesses selling goods to reservation Indians for cash or exchange [citing *Warren Trading Post*], but no similar intent is evident with respect to sales by Indians to nonmembers of the tribe."

Colville, 447 U.S. at 155-156.

The *Colville* opinion demonstrates that the conclusion of the Court of Appeals below (i.e., that the Indian Trader Laws automatically place every trader beyond state regulatory authority) is in error. This is further and explicitly illustrated by this Court's holding in *Potowatomi*.

In conformance with its prior decisions in *Colville* and *Moe*, this Court held in *Potowatomi* that the Indian tribe's sovereign immunity did not prevent the State of Oklahoma from taxing cigarette sales to non-Indians at the tribal store. Furthermore,

this Court reaffirmed the principle that the tribe has an obligation to assist in the collection of validly imposed state taxes on such sales. 498 U.S. at 512. While this Court explicitly recognized that Indian sovereign immunity could bar the State of Oklahoma from pursuing a lawsuit directly against the tribe for the tax imposed, it noted that there existed adequate alternate remedies to the state. Among the remedies specifically enumerated was the collection of the state tax from cigarette wholesalers:

> "There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives. We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State. See *Ex parte Young*, 209 U.S. 123 (1908). And under today's decision, *States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, (Colville, supra,* 447 U.S. at 161-162), *or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores, City Vending of Muskogee, Inc. v. Oklahoma Tax Commission,* 898 F.2d 122 (CA10 1990)" (Emphasis added).

Potowatomi, 498 U.S. at 514.

This Court obviously recognized that vendors engaged in trade with Indian tribes on reservations are not automatically absolved or immune from complying with duly promulgated state tax regulations intended to ensure tax payment for sales made to non-Indians. In addition, the state is empowered to use such traders to assure that the proper taxes are, in fact, collected and remitted. The imposi-

tion of such a duty upon vendors trading with Indians is a minimal burden permissible under the balancing of federal, state, and Indian interests.

The Court of Appeals opinion improperly attempted to distinguish *Potowatomi* on a ground neither considered nor mentioned in any of this Court's opinions. Specifically, the Court of Appeals stated that the remedies listed in *Potowatomi* "might somehow be used to retroactively collect taxes unpaid on past sales" (A11) but did not permit the state to exercise prospective regulatory authority over Indian traders. This distinction does not appear in this Court's *Potowatomi* decision, and neither is it logical. Whether a state possesses the right to place minimal burdens upon an Indian trader will not be altered or influenced by the fact that such burden is prospective or retroactive.

The Court of Appeals further ruled that even if minimal burdens were permissible, the instant tax regulations impose "significant" burdens which require their invalidation (A11-A12). This point is clearly in error. In *Colville*, this Court approved recordkeeping requirements which were more pervasive and expansive than the burdens imposed under the New York regulations.

Absent a reversal of the Court of Appeals order, the avoidance of tax in contravention of principles of sound public policy and federal law will continue and likely expand, both in New York State and nationwide. This should not be permitted since, as this Court has stated:

> "We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere."

Colville, 447 U.S. at 155.

Conclusion

For the reasons stated above, the Court of Appeals Order of June 10, 1993 should be reversed and the validity of the state's tax regulations be upheld.

Dated: Albany, New York
December 14, 1993

Respectfully submitted,

ROLAND, FOGEL, KOBLENZ & CARR
Attorneys for the Empire State
Petroleum Association, Inc. and the
Petroleum Marketers Association of
America, Inc.
One Columbia Place
Albany, NY 12207
(518) 434-8112

EMILIO A.F. PETROCCIONE
Counsel of Record
USHER FOGEL
Of Counsel